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Nos. 87-1614, 87-1639 and 87-1668

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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JOHN W. MARTIN, *et al.*,
*Petitioners,*
v.
ROBERT K. WILKS, *et al.*,
*Respondents.*

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RICHARD ARRINGTON, JR., *et al.*,
*Petitioners,*
v.
ROBERT K. WILKS, *et al.*,
*Respondents.*

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PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
*Petitioners,*
v.
ROBERT K. WILKS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF RESPONDENTS

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The International Association of Fire Fighters, AFL-CIO ("IAFF"), with the written consents of the parties,[1] respectfully submits this brief amicus curiae in support of the respondents, urging affirmance of the decision of the court of appeals below.

## INTEREST OF THE AMICUS CURIAE

The IAFF is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many members across the country who are employed in cities and towns whose employment rights are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits to which they are not parties. Most of the jurisdictions employing IAFF members operate pursuant to civil service laws which prescribe procedures for promotions. The legal principles espoused by the Court of Appeals below are perfectly consistent with the precedent of this Court. Those principles protect the rights of public employees to challenge decisions of their employers, taken pursuant to settlements of employment discrimination lawsuits brought by others, which constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42

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[1] Letters of consent have been filed with the Clerk of the Court.

U.S.C. § 2000e, and the Fourteenth Amendment to the U.S. Constitution.

This brief is filed because of the IAFF's interest in ensuring the continued protection of its members' procedural due process rights.

## STATEMENT OF THE CASE

The IAFF adopts the Statement of the Case found in the brief of respondents.

## SUMMARY OF ARGUMENT

There is no general obligation for a nonparty to litigation to intervene in order to ensure that a judgment rendered in such litigation will not affect his legal rights. This Court's decisions confirm the application of this rule to employment discrimination actions.

When the due process rights of a public employee clash with the general public policy favoring settlement of employment discrimination actions, the Court of Appeals was correct in its holding that the latter must yield. The fact that an employee *may* intervene in a proceeding does not mean that he *must* intervene; his failure to do so will not prejudice his ability to challenge an action of his employer which he claims to be unlawful when that action occurs. Adoption of a contrary rule is wholly inconsistent with the statutory scheme.

## ARGUMENT

### AN EMPLOYEE'S RIGHT TO PURSUE A LAWSUIT CHALLENGING HIS EMPLOYER'S ACTIONS TAKEN PURSUANT TO A CONSENT DECREE IN A SUIT TO WHICH THE EMPLOYEE WAS NOT A PARTY IS NOT AFFECTED BY THE EMPLOYEE'S FAILURE TO INTERVENE IN THAT SUIT.

In 1934, Justice Brandeis wrote for a unanimous Court that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase National Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding," he went on, "a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* See also, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari).

Consistent with this principle, the Court below twice held that an employee need not intervene in pending employment discrimination litigation in order to preserve his right to challenge actions, taken pursuant to a settlement of such litigation, which adversely affect him and which he believes are the product of unlawful discrimination. In the first instance, *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983), the Eleventh Circuit dismissed an appeal from a denial of a motion to intervene, holding that the nonminority employees who sought intervention

> could not have alleged that they had suffered any reverse discrimination as a result of the Board's or

> the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. *For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights.* The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree. [Fn. omitted]. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. . . . Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified in finding no prejudice to the BFA members' rights in denying intervention. [Fn. omitted].

720 F.2d at 1518-1519. (Emphasis added). Joint App. 158-159.

In the second instance, the Eleventh Circuit confirmed the propriety of respondents' reliance upon the earlier ruling and held that their independent challenge to City action denying them promotions based on the consent decree could proceed in federal court. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492 (11th Cir. 1987). Concluding "that these plaintiffs were neither parties nor privies to the consent decrees," the Court held "that their independent claims of unlawful discrimination are not precluded." 833 F.2d at 1498. Pet. App. 12a.

The Eleventh Circuit recognized that it was presented with a clash between two strong doctrines: on the one hand, that voluntary affirmative action plans are favored solutions for employment discrimination and on the other that no person should be denied a judicial opportunity to

assert a violation of his civil rights. The Court correctly concluded that in such a conflict, the rights of the individual must prevail.

This opinion is wholly consistent with this Court's decision in *Local Number 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed.2d 405 (1986). There, a union which had intervened and presented objections to a proposed consent decree, attempted to block the settlement. This Court held that the union could not, simply by reasons of its intervention, "preclude other parties from settling their own disputes and thereby withdrawing from litigation." 92 L.Ed.2d at 427-428. However, the Court also held that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement." 92 L.Ed.2d at 428. The gist of this holding is that a nonconsenting intervenor may continue to press claims that conduct covered by a consent decree is unlawful. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree . . . [T]he consent decree does not purport to resolve any claims the [intervenor] might have under the Fourteenth Amendment, . . . Section 703 of Title VII, . . . or as a matter of contract. . . ." *Id.*

Justice O'Connor specifically so noted in her concurring opinion—"As the Court explains, nonminority [public] employees therefore remain free to challenge the race-conscious measures contemplated by proposed consent decree as violative of their rights under § 703 [of Title VII of the Civil Rights Act of 1964] or the Fourteenth Amendment." 92 L.Ed.2d at 429. Surely if nonconsenting intervenors retain such rights, even where they have specifically intervened to object to entry of a consent decree, then nonconsenting persons who do not intervene should enjoy at least the same modicum of procedural protection.

The rights of nonminority nonparticipants in affirmative action settings were at the heart of *Wygant v. Jackson Board of Education*, 476 U.S. ——, 90 L.Ed.2d 260 (1986) as well. Treating the contention that the impact on non-minorities of the racial preference in layoffs was permissible under the Fourteenth Amendment because a majority of the affected non-minority employees did not object to it, Justice Powell explained:

> [W]hen a state implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. . . . [T]he petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race. That claim cannot be waived by petitioners' more senior colleagues.

90 L.Ed.2d at 273, n.8.

Petitioners assert that unless nonparty employees intervene in class action employment discrimination suits to challenge the potential effects of proposed settlements, such nonparties should be precluded from complaining if and when the potentiality becomes the actuality. They would have this Court saddle the innocent nonparty, in advance of any specific impact on him, with the requirement that he discern what that impact someday may be and retain counsel to represent his interests, in a case in which he otherwise would have no role. They suggest that only by this method can the parties enjoy the benefits of finality in the settlement of their dispute.

All settlements embodying affirmative action contain some risk that the settlement may be challenged at some point in the future. While the parties may be deriving

significant benefits from resolving their differences, they may be doing so at the expense of non-parties. What petitioners ask this Court to do is to eliminate the risk that nonparties will come forward to complain when it comes time for them to shoulder the burdens of the decree, for which only the parties have received a benefit. They ask this Court to declare such post-decree complaints from nonparties to be impermissible *per se*. Such an insulation from suit simply cannot be accomplished by general notice to nonparties that litigation is being settled in a manner which may some day affect them.

This Court has held that a properly created affirmative action plan is a strong defense in subsequent actions by nonparties. See, *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987). Petitioners take no solace in this holding. They simply want to be saved from ever having to raise the defense.

The dilemma which petitioners and their amici predict will result from an affirmance is that multitudes of challenges to decree-based actions will be mounted by affected nonparty employees. This dilemma is little different than that faced in *W.R. Grace Co. v. Local 759, Rubber Workers*, 461 U.S. 757 (1983). In *Grace*, this Court unanimously held that the settlement of employment discrimination charges, to which a union is not a party, which causes an employer to violate the provisions of a collective bargaining agreement, does not insulate the employer from any relief which the union may seek to remedy the contract violation. The facts were these: the Company settled sex discrimination charges by entering into a conciliation agreement with the EEOC which in part provided that in the event of layoffs, the Company would maintain the existing proportion of women in the bargaining unit. When a layoff occurred, the Company complied with the conciliation agreement, thereby causing the layoff of more senior men while junior female employees were retained in service. The union grieved for

the men and prevailed in arbitration. The Company filed suit in which it contended that public policy prevented enforcement of the contract in the circumstances.

Because this Court disagreed in such compelling language, we quote at some length:

> Given the Company's desire to reduce its work force, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations. When the Union attempted to enforce its contractual rights, the Company sought a judicial declaration of its respective obligations under the contracts. During the course of this litigation, before the legal rights were finally determined, the Company again laid off employees and dishonored its contract with the Union. For these acts, the Company incurred liability for breach of contract.
>
> * * * *
>
> The Company was cornered by its own actions, and it cannot argue now that liability under the collective-bargaining agreement violates public policy.
>
> Nor is placing the Company in this position with respect to the court order so unfair as to violate public policy. Obeying injunctions often is a costly affair. Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses. As interpreted by [the arbitrator], the collective-bargaining agreement placed this unavoidable burden on the Company. By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from perform-

> ing the collective-bargaining agreement and subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrator's interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocations of the burden. [Footnote omitted].
>
> * * * *
>
> Enforcement of the [arbitral] award will not inappropriately affect this public policy [of voluntary compliance with Title VII]. In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent . . . Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored . . . Although the ability to abrogate unilaterally the provisions of a collective bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.

461 U.S. at 767-768, 770, 771. [Citations omitted].

Although the *Grace* case involved a settlement during the EEOC administrative process, the *Grace* principles are equally applicable here. An employer cannot alter the statutory or constitutional rights of its employees by court action unless the employees themselves agree, or are present or otherwise represented before the court. While the employees may voluntarily intervene, if they do not do so, it is incumbent on the employer to seek

their joinder if it wants to bind them to the result of the action. Otherwise, the employees properly remain free to challenge the employer whenever the court settlement invades their protected rights.

This Court has consistently rejected arguments that individual enforcement of rights against discriminatory conduct should be precluded. See *Ashley v. City of Jackson*, *supra*, and cases cited therein. The simple fact that such enforcement may implicate conduct purportedly immunized by a consent decree is not a basis to bar the door to the courthouse. Whether the individual ultimately prevails on his claim is not the issue; whether the law can deny him the right to try is.

Despite petitioners' protestations to the contrary, the right to object to the entry of a consent decree to which one is not a party is not an opportunity to try an individual employment discrimination case on the merits. A fairness hearing, after all, is designed to evaluate the fairness and adequacy of a proposed settlement for the absent class members. It is *their* claims that are going to be extinguished as a result, not those of absent nonparties. A fairness hearing is not intended to be the forum for intervenors individually to obtain judgments their own claims of discrimination which may result if the settlement is approved.

Even if this was the purpose of a fairness hearing, the respondents here cannot properly be criticized for not attempting intervention before the consent decree was entered. As shown earlier, other nonminority employees did attempt to intervene and were rebuffed in an order affirmed by the U.S. Court of Appeals for the Eleventh Circuit. Due to the earlier order, the Circuit Court reiterated in its opinion here under review, "we took pains to point out in Jefferson County that the denial of the motion to intervene was not prejudicial to the movants partly because they were not precluded from

instituting an independent Title VII suit." Pet. App. p. 15a, n.21.

Clearly, these respondents, unlike those non-minority employees in other cases relied on by petitioners, had a reasonable basis for not acting earlier. No party here took issue with the earlier order; no petition for a writ of certiorari was filed from the 1983 decision. Thus respondents here justifiably waited for their cause of action to accrue before seeking federal court relief.[2]

It is the rare public employee who can afford the expense of retaining an attorney to intervene in litigation to protect a right which may never be infringed upon. Yet if this Court accepts petitioners' arguments, that expensive burden will be the ultimate consequence of this Court's decision. This cannot be what Congress, the drafters of the Federal Rules of Civil Procedure, and the framers of the Fourteenth Amendment intended.

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[2] The petitioners would penalize respondents because they selected as their counsel the same attorney (Mr. Fitzpatrick) who represented the union and other individuals in the consent decree litigation. There is no precedent for the proposition that one who selects an attorney who appeared in a prior proceeding is therefore bound by the result of that earlier proceeding in the same manner as the party who retained the attorney in that proceeding. The petitioners' implication to the contrary is startling.

## CONCLUSION

For the foregoing reasons, the Amicus IAFF submits that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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